United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

76-1087

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United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

BENNY ONG, et. al.,

Defendant-Appellant.

PETITION FOR REHEARING
WITH A SUGGESTION FOR REHEARING EN BANC

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Cases Cited

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BRIEF FOR APPELLANT

TO THE HONORABLE COURT:

On September 14, 1976, this Court (Lumbard, Friendly and Oakes, Circuit Judges) unanimously affirmed the judgement of conviction against the appellant, BENNY ONG, entered in the United States District Court for the Southern District of New York, (Honorable Charles L. Brieant, Jr., Judge) for bribery and conspiracy to bribe investigators of the Immigration and Naturalization Service.

In this proceeding, appellant moves this Court [redacted] for rehearing of the September 14, 1976 opinion and order or for the direction of an en banc Court to redetermine whether the combination of errors at trial, while harmless enough in themselves, congealed to present a problem of prejudicial overspill which denied to the appellant a fair trial.

THE FACTS

During a two-week trial, after which appellant was convicted of one count of conspiracy to commit bribery and 65 counts of bribery, the jury was treated to extensive sessions during which they heard tape recorded conversations of the alleged bribery transactions. These tapes, while in the main undeniably relevant, did contain mentions, whether true or untrue, of various additional crimes and unsavory activities, most markedly, narcotics transactions. (This Court itself noted three prime examples, see Slip Op No. 1052-55 at pages 5530-5531.) While the Trial Court partially redacted one tape, it refused to redact two others, though it later informed the jury that irrelevant material had been removed (redacted), from these tapes. Other arguably prejudicial material involved testimony on the stand concerning appellant's alleged involvement with then Special Prosecutor Maurice Nadjari and appellant's involvement with firearms.

Later, in statements by the Prosecutor, the Government sought to link up all these extraneous matters which had leaked into the trial, by gratuitously referring to appellant as "Chinatown's chief corruptor for 20 years". (A*-G2). Additional comments outlined to this Court in Appellant's Brief dealt with summing up facts not in evidence, referring to unadmitted Jencks material and invoking the prestige of the Government.

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* A - Refers to Appellant's appendix.

The combination of all this "harmless" material admitted into the trial arena by the trial judge, added to by its underscoring through the Prosecutor's improper summation, produced error which this Court should not have viewed as "irreversible".

I.

THIS COURT SHOULD HAVE REVERSED ON THE BASIS OF THE ADMISSION OF PREJUDICIAL AND IRRELEVANT EVIDENCE ALONE.

This Court recognized the desirability "...in any criminal trial to keep from the jury any evidence of malfeasance by the defendants not related to the charges at issue". (Slip Op at 5530, citing U.S. v. Tomaiolo, 249 F. 2d, 683 [2nd. Circuit, 1957]). The Court further granted the contention that "...ordinarily there are few subjects more potentially inflammatory than narcotics and thus such evidence should usually be excluded in a non-narcotics trial, ..."(Slip Op at 5531.) Lastly, this Court allowed that the material in question was "volatile" and "not directly connected with the instant indictment". (Slip Op at 5532).

It is apparent that this Court believed that the evidence, even though highly prejudicial, was outweighed by its ability to make the fact of the congenial relationship among the defendants and the agents more probative with it than without it. A close reading of the record on appeal will show that there existed, already in evidence, far more innocent conversations which demonstrated the

same desired fact, i.e. congeniality. Moreover, this marginally probative material was surrounded and infested with material the trial judge himself termed irrelevant (Slip Op at 5533).

This Court was not, however, convinced that the effect of these volatile items overpowered their relevance. The Prosecutor, in his rebuttal, however (A-G 1), seemed to base his response to defense counsel's defense of economic coercion not on the tapes in question, but, in the main, upon other less inflammatory materials already in evidence.

Appellant submits that unless this Court was satisfied that the evidence in question was essential to the point sought to be proven, and further, that this point could not have been proven by way of some less inflammatory material, that a new hearing should be held to re-evaluate the effects of its admission.

II.

THE PROSECUTOR'S SUMMATION WAS HIGHLY IMPROPER AND THE CONVICTION SHOULD HAVE BEEN REVERSED ON THAT BASIS ALONE.

The A.B.A. has stated quite succinctly the proper scope of the Prosecutor's summation. It reads as follows:

> "§5.8. Argument to the Jury.
> (a) The Prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the Prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
> (b) It is unprofessional conduct for the Prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of

> the defendant.
> (c) The Prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> (d) The Prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict." American Bar Association Project on Standards for Criminal Justice; Standards relating to the Prosecution Function and the Defense Function.

Appellant has lain before the Court examples of violations of each sub-paragraph of the Standards.

At A-G 16, the Prosecutor refers to a crucial fact not in evidence. The defense had offered that since apparently unneeded consent forms were signed by INS agents, that these agents must have been suspected of some impropriety. During summation, the Prosecutor opined that such forms were standard operating procedure, even though such a fact had never been shown during trial. Upon objection, the following colloquy resulted:

> [PROSECUTOR]: "* * * This is a standard consent form. The F.B.I. gets it every time anybody puts on recording equipment."
>
> [DEFENSE COUNSEL]: "There's no proof here it's a standard form of any sort, Your Honor."
>
> THE COURT: "The jury's determination as to what the proof shows will be controlling." (A-G 15)

Appellant submits that by no stretch of the imagination could this be considered "adequately ... corrected" or "responded [to] effectively" (Slip Op at 5538). These are clear violations of §5.8 (a) of the Standards.

The Prosecutor's constant remarks and insistent attempts at characterization of the appellant as, by the U.S. Attorney's own words, "Chinatown's chief corruptor for 20 years" (A-G2) resounded clearly as a crude attempt to convict a man on his reputation and on what he is rather than the evidence of his guilt or innocence. The Prosecutor made repeated remarks, thinly veiled, always harkening back to the catchword "20 years".

> "Well, ladies and gentlemen, I suppose even Benny Ong is entitled to one mistake [being fooled by phony corrupt INS agents] in 20 years. 20 years in this business, and that's precisely what he told you himself [in one of the disputed tapes.]" (A-F7).

> "And you can be sure that Benny Ong, left to his own devices, would have done just that [bribing Government agents], as he had done for 20 years." (A-F20)

> "Under [defense counsel's] theory of this case, his theory of oppression, Mr. Ong, Chinatown's chief corruptor for 20 years, would have immunity to illegally gamble, illegally bribe and anything else..." (A-G2) **[emphasis supplied]**

The remarks, aimed and calculated as they were to inflame the passions and prejudices of the jury were a violation of §5.8 (c) of the Standards.

The Sixth Circuit was faced with such a situation recently in a case revolving about an appeal from a conviction for transmitting a threat through Interstate Commerce (18 U.S.C §875 [c]). In the face of similar remarks, but with an even stronger caution from the Trial Court than we have present here, the Sixth Circuit still found it necessary to reverse, notwithstanding sufficient evidence of guilt:

> "Although there is sufficient evidence from which the jury could find that appellant communicated threats of injury, as charged in the two counts in which appellant was found guilty, reversal is required because the Prosecutor intentionally and for no proper purpose injected into the trial the spectre of organized crime and the Mafia. This Prosecutorial misconduct, by itself, requires reversal of appellant's conviction." U.S. v. Love, 19 Cr.L. 2167, — F. 2d — (6th Cir. 1976).

Even in view of what it terms the "massive evidence of guilt", this Court should have exercised its supervisory function and reversed to protect the integrity of the Judicial system and the Prosecutorial function.

Notwithstanding this Court's feelings that the "placement of Ong at the pinnacle of corruption in Chinatown" did not improperly prejudice the appellant, appellant maintains that in-depth examination, akin to Love, is needed.

III.

THE COMBINATION OF PREJUDICIAL EVIDENCE AND IMPROPER SUMMATION DENIED APPELLANT A FAIR TRIAL AND DUE PROCESS UNDER THE LAW.

This Court recognized in United States v. Alfonso-Perez, 19 Cr.L. 2258, _____ F.2d _____ (2nd Cir. 1976) that while individual errors during trial may appear innocuous, when combined with inflammatory and improper summation, a perilous situation is created. See also, United States v. Bozza, 365, F.2d 206 (2d Cir, 1966).

The Prosecutor in the case at Bar found it to his benefit to repeat and reinforce the already marginally relevant and highly prejudicial material admitted during trial as a point of his final argument to the jury. In the popular culture, any mention of Chinatown is so heavily pregnant with thoughts of drugs and illegal aliens that to feed the understandably fertile minds of the jurors any further is to deny a fair trial. Twice on page A-F 36 the Prosecutor draws a caution, one of these times for outlandishly placing the credibility of the United States at issue if the defendants are acquitted. At page A-F34, the Prosecutor infers that defendants would have lied had they taken the stand. This is patently improper and even with limiting instructions, grossly prejudicial.

To ask the jury to ignore the entire story of narcotics, Nadjari and guns and instead pick out the few words of congeniality hidden within those conversations is patently unfair. Redacting

is a job for the Court not the jury. It is positive that not even the greatest judge, no less the meanest juror, could succeed at such verbal gymnastics. Bruton v. United States, 391 US 123 (1968); see also, United States v. Della Paoli, 352 US 232, 246 (1957) (Frankfurter, dissenting). The jury bolstered by the Prosecutor's refresher could not help but overlook any limiting instructions it may have been given. Moreover, in this case, those limitations were few and inbetween. Cf, Jackson v. Denno, 378 US 368 (1964).

CONCLUSION

This Court should view the admission of irrelevant evidence and improper Prosecutorial argument as combining to deny appellant a fair trial and due process under law.

Accordingly, this case should be reversed and remanded for a new trial consistent with the basic protections of the Sixth Amendment.

Respectfully submitted,

BARRY IVAN SLOTNICK
for Benny Ong

Dated: New York, New York
September 27, 1976

ATTORNEY'S CERTIFICATE

BARRY IVAN SLOTNICK, attorney for Defendant-Appellant, BENNY ONG, hereby certifies that the within petition is presented in good faith and not for reasons of delay.

BARRY IVAN SLOTNICK
Attorney for Defendant-
Appellant
BENNY ONG

SLOTNICK

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 29/~~28~~ day of Sept. , 19 76 at No. 1 St. Andrews Pl., NYC deponent served the within Brief upon U.S. Atty. So. District of NY the Appellee herein, by delivering ~~3~~ 3 true copies ~~xxxxx~~thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this ~~28~~ 29 day of Sept. 1976

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, ~~1978~~ 1978